

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

3 DELAWARE MARKETING PARTNERS, :
4 LLC, a Delaware limited :
5 liability company, :
6 Plaintiff :
7 v. :
8 :
9 CREDITRON FINANCIAL SERVICES, :
10 INC., a Pennsylvania :
11 corporation, and TELATRON :
12 MARKETING GROUP, INC., a :
13 Pennsylvania corporation, :
14 Defendants :
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CA No.: 04 - 263

11 Argument held in the above-captioned matter
12 on Friday, July 20, 2007, commencing at 9:52 a.m.,
13 before the Honorable Sean J. McLaughlin, in the
14 United States Federal Court House, 17 South Park Row,
15 Erie, Pennsylvania 16501.

17 For the Plaintiff:

18 Brett W. Farrar, Esquire
19 Dickie McCamey & Chilcote, PC
20 Two PPG Place, Suite 400
21 Pittsburgh, PA 15222

21 For the Defendants:

22 Craig A. Markham, Esquire
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24 150 East Eighth Street
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Reported by Sondra A. Black
Ferguson & Holdnack Reporting, Inc.

1 THE COURT: This is the time we set for argument on
2 objections to the Magistrate Judge's R&R. Why don't we
3 start with Mr. Markham.

4 MR. MARKHAM: Morning, Your Honor.

5 THE COURT: Morning.

6 MR. MARKHAM: We've raised objections to
7 Magistrate Judge's recommendations on two motions. One is
8 the Motion to Dismiss our Counterclaim and the other is
9 Motion For Summary Judgment on the aspects that were
10 remaining after she made recommendations on the Motion to
11 Dismiss. Unless the Court has another order, I'll take
12 them with the Motion to Dismiss first.

13 THE COURT: That'll be fine.

14 MR. MARKHAM: The Motion to Dismiss sought to
15 dismiss Count 1 of our counterclaim, which is a breach of
16 contract counterclaim. And the breaches which were
17 encompassed in Count 1 included the Plaintiff's failure to
18 produce the quality of list --

19 THE COURT: And quantity.

20 MR. MARKHAM: And quantity, as well as
21 Plaintiff's breach of noncompete provisions of the contract
22 and confidentiality provisions. Magistrate Judge
23 recommended that the first two, which is quality and
24 quantity, be dismissed as a basis for the counterclaim
25 based upon application of the parol evidence rule. It's

1 our position that the parol evidence rule would not
2 prohibit us from proving or asserting breaches of contract
3 dealing with quality and quantity. Although those matters
4 are not set forth in the written agreement, the precontract
5 representations do not contradict, nor alter, any written
6 terms of the agreement. And they are necessary, I would --

7 THE COURT: Actually, in a sense they do. And
8 let me -- let me backtrack a little bit and ask you a
9 couple questions now that we're on this parol evidence
10 aspect. In your brief -- put a finer point on it. In your
11 brief in opposition to the Plaintiff's Motion For Summary
12 Judgment -- I'm all the way back there now -- you say, at
13 Page 4 -- you say, "Even more surprising, it seems that
14 Plaintiff has taken the remarkable position that there was
15 no condition precedent to Plaintiff's entitlement to
16 payment." And then you go on to say, "Apparently, the
17 Plaintiff would have this Court believe that there was no
18 requirement that Plaintiff perform any services or at least
19 that it perform any services of value in order to earn its
20 payment." But, as a matter of fact, in this case services
21 of value were provided, because it's indisputable that
22 gross profits were generated and you took a percentage of
23 it; isn't that right?

24 MR. MARKHAM: It's correct for --

25 THE COURT: I mean, if they had done nothing,

1 you would owe them nothing. But it's indisputable that
2 they did something, right?

3 MR. MARKHAM: That's correct, they did
4 something. And the question that we've presented, and I
5 think our counterclaim presents on this point, is, did they
6 do what they promised to do. And in that do -- I mean, did
7 they produce the lists of the quality and nature that
8 justified the 28.57 percent share of these revenues.

9 THE COURT: Let me ask this question, this
10 hypothetical: Your position is that, and I'll use your
11 term, as a condition precedent, if you will -- and I think
12 it's the wrong term, but I understand what you're talking
13 about -- that in order for them to earn their keep, their
14 percentage of the agreement, the 27 or 28 percent, they had
15 to supply lists of a quality of about 95 percent, and they
16 had to produce, for instance, with respect to monthly
17 mailings, mailings in the vicinity of 200,000, as I
18 remembered the part of the claim. Now, let's just assume
19 for the sake -- and I know there's a contention that over
20 the period of time the quality diminished to the point
21 there was 57 percent or 60 percent -- you know, diminution
22 in that nature. And there was a -- rather than getting
23 200,000 at times, there'd be 120,000 or 126,000. But my
24 question would be this: Let's assume, for the sake of
25 discussion, that rather than providing you lists uniformly

1 of 95 percent quality, they provided you lists uniformly of
2 85 percent quality, or monthly numbers of 180,000. Would
3 you not have to pay them their respective percentage at
4 that point? My question is, your client became the final
5 arbitrator of where on this sliding scale he would choose
6 to reimburse them; didn't he?

7 MR. MARKHAM: I guess, in a way, from the way
8 that this relationship developed, that's what happened.
9 But our point is, this is an issue that eventually the jury
10 has to determine, whether what they produced for us was of
11 the nature and quality that they had promised to produce.

12 THE COURT: Here's my problem, Craig -- and I
13 spent a lot of time with this file and looking at it from
14 all different angles. It's kind of a walking tour of a
15 contracts class, to a certain extent -- it is undeniable
16 that a benefit was conferred on you, in the sense that you
17 made money. You simply didn't make as much money as you
18 hoped you were going to make. And it's also undeniable
19 that you have not turned over, back to the person who
20 precipitated this gross profit, much of the profit that you
21 made.

22 Now, if you strip everything else away, isn't
23 there almost an unjust enrichment aspect on this thing?

24 MR. MARKHAM: I disagree with the Court's
25 characterization of what happened with the money aspect of

1 all this. First, let me make sure we understand, too, that
2 the Plaintiff has been paid three quarters of a million
3 dollars so far.

4 THE COURT: Can I ask a factual question before
5 you go on. Do you know, or do you have some sense, on a
6 percentage basis, what percentage of the gross profit that
7 was generated as a result of whatever lists were given to
8 you by the Plaintiff -- what percentage you kept and what
9 percentage you gave back to the Plaintiff? I know you
10 gave -- what was the figure you paid them?

11 MR. MARKHAM: 755,000, I think.

12 THE COURT: What percentage is that of the total
13 amount generated?

14 MR. MARKHAM: I don't know. But I'll tell you
15 it's much less than the 28 percent that the contract would
16 provide.

17 THE COURT: You have no idea at all how much it
18 is?

19 MR. MARKHAM: I have the raw numbers, but I just
20 can't do the math in my head.

21 THE COURT: Give me just a raw figure.

22 MR. MARKHAM: I think the raw numbers, in terms
23 of gross revenues -- this is gross revenues -- for the time
24 period that we're looking at is around \$9 million. Now,
25 that's not profit. That's not income over expenses.

1 That's just gross revenues. So they're paid less than a
2 ninth of that amount. And I think we can't lose sight of
3 the fact --

4 THE COURT: So less than a ninth. So we're
5 talking something about, what? 10 -- no. What would that
6 be? What is the percentage basis?

7 MR. MARKHAM: It's less than 10 percent. This
8 is where my math is failing me, Judge.

9 THE COURT: I was terrible at it. So, in other
10 words, under the agreement -- if the agreement obtained in
11 this case, rather than the 10 percent of that -- is it \$9
12 million?

13 MR. MARKHAM: Yes.

14 THE COURT: They'd be getting 27 percent of the
15 9 million; is that right?

16 MR. MARKHAM: 28.57.

17 THE COURT: Okay. I appreciate that. Go ahead.

18 MR. MARKHAM: But when we look at the financial
19 issues, we can't lose sight of the fact of the expenses
20 that were incurred based upon representations that the
21 revenue would be much, much greater than it was. My client
22 invested a lot in personnel, time, and training to ramp up
23 for a project volume that did not come to be. And the
24 training was very expensive. And these people just
25 couldn't be let go or laid off. They held them on for a

1 long time. Eventually a lot of them were laid off, in
2 light of the low revenue that was coming in.

3 So it's not just that --

4 THE COURT: But your -- who's the -- I want to
5 use the word "comptroller," but that might be the wrong
6 word. Who is the woman that was deposed for your side?

7 MR. MARKHAM: There was three of them:
8 Mrs. Cavato, who is part owner; Mrs. Desanti-Boehm was vice
9 president; and we have Terry Smith who was also a vice
10 president. None of them were financial people.

11 THE COURT: On the issue of -- and I guess, to a
12 certain extent, this ties in with your inducement claim,
13 but on the issue of ramping up by way of additional capital
14 investment, I looked at the transcripts, such as they are,
15 and from what I could see -- but I'm going to give you an
16 opportunity to disabuse me of it -- nobody in your
17 organization was able to delineate with even -- with any
18 specificity what damages actually were sustained in
19 reliance upon the perception that you were going to make
20 more money than you did. And this is the end of the case.
21 I mean, where is that in the record?

22 MR. MARKHAM: You know, that was not an issue
23 that was raised in the motions, but there is evidence --

24 THE COURT: Magistrate addressed it in her R&R.
25 She didn't use the phrase, but it was kind of "this is put

1 up or shut up time" on this question of ramping up. On
2 this question of consequential loss or reliance lost. And
3 she said you didn't prove it. You didn't raise a triable
4 issue of fact.

5 MR. MARKHAM: I don't think she was looking at
6 that aspect of it, Judge. And, on summary judgment, she
7 concluded that there was insufficient evidence to support
8 the claim that there was a breach of a noncompete. That's
9 what she was talking about.

10 THE COURT: Well, I guess that's just a question
11 of going back and looking at the thing.

12 MR. MARKHAM: With regard to the issue that you
13 have raised, there is evidence of record that they did hire
14 additional people to handle what they understood to be the
15 volume of -- the volume of this program. And they had to
16 train them, which was a long process, and they had them
17 sitting by the phones waiting for the -- you know, making
18 calls or waiting for these calls, and it just didn't come
19 to pass. So that's the nature of the expense side.

20 THE COURT: Let me ask you a question about
21 fraud in the inducement.

22 MR. MARKHAM: Okay.

23 THE COURT: I looked at some Pennsylvania law on
24 this, and I'm going to quote you from a -- this is a -- the
25 Pennsylvania Superior Court. And this is what the Court

1 says: It says, "In sum, Bardwell," talking about another
2 case, a Pennsylvania case, "permits the admission of parol
3 evidence of representations concerning a subject, dealt
4 with in an integrated written agreement, and made prior to
5 or contemporaneous with the execution of the agreement, to
6 modify or void the terms of that agreement only" -- and
7 "only" is highlighted -- "only where it is alleged that the
8 parties agreed that those representations would be included
9 in the written agreement, but were omitted by fraud,
10 accident, or mistake. This is commonly referred to as
11 'fraud in the execution' because the party proffering the
12 evidence contends that he or she executed the agreement
13 because he or she was defrauded by being led to believe
14 that the document he or she was signing contained terms
15 that were actually omitted therefrom. Such a case is to be
16 distinguished from a 'fraud in the inducement case' such as
17 the instant one, where the party proffering evidence of
18 additional prior representations does not contend that the
19 parties agreed that the additional representations would be
20 in the written agreement, but rather claims that the
21 representations were fraudulently made and that, but for
22 then, he or she never would have entered into the
23 agreement."

24 The court goes on on to say that the parol
25 evidence bars that type of fraud in the inducement. That's

1 precisely what your claim here is about; isn't it? You're
2 not claiming fraud in the execution of the agreement;
3 you're claiming there were fraudulent inducements. And the
4 Pennsylvania Superior Court and Commonwealth Court says the
5 parol evidence bars that.

6 MR. MARKHAM: Well, let me just say this, Judge:
7 That isn't why the fraudulent inducement claim was
8 dismissed here. Or that's not why the recommendation
9 was --

10 THE COURT: It was actually dismissed on the
11 basis of the statute of limitations. And I'm going to talk
12 about that, but I'm not entirely convinced that you're not
13 entitled to a relation back relief. But this is on the
14 merits. I do not see, under Pennsylvania law, how a
15 fraud -- as a matter of fact, put even a finer point on it,
16 this is a case called Greylock, and it's 879 A.2nd 864,
17 this is a Commonwealth Court Case, 2005, and it says,
18 "Greylock correctly points out that the parol evidence rule
19 bars proof of fraudulent inducement to a contract where the
20 contract is fully integrated." Here we have not only a
21 fully integrated contract but we have a situation where the
22 very party who's claiming fraud in the inducement is the
23 party who drafted it. Now, how does your fraud claim --
24 forget about the statute of limitations; I'm onto the
25 merits. How does your fraud claim survive that

1 elemental -- apparently element principle of Pennsylvania
2 contract law?

3 MR. MARKHAM: Well, of course, I'm not prepared
4 to go into detail on that point because it wasn't raised in
5 any of the motions.

6 THE COURT: But it's part of the broader parol
7 evidence rule that's floating through the case.

8 MR. MARKHAM: The fraud and inducement issue
9 here is that, first, the contract, although it contains an
10 integration clause, does not deal with nor address the
11 issues relating to the fraud. And the fraud we're
12 suggesting is this mathematical formula that was provided
13 to us to calculate the revenues to be generated --

14 THE COURT: How can that be a fraud? I thought
15 the fraud here, either negligently -- it could be negligent
16 misrepresentation, I think you plead it both ways,
17 intentional or negligent. I thought, conceptually, the
18 contention was the fraud was the misrepresentations either
19 intentional or negligent as to the quality and quantity
20 that would be supplied. But under Count 2 of your
21 counterclaim, you've alleged mutual mistake of fact with
22 respect to the formula that the -- the mathematical formula
23 upon which profits could be computed. So as a conceptual
24 matter -- and I think you also argue that it wasn't until
25 very late in the depositions that, you know, this tumbled

1 out, even to the Plaintiff. How can that form the basis
2 for a misrepresentation made at the -- at the outset if
3 your contention is there was a mutual mistake of fact?

4 MR. MARKHAM: Well, it's quite the alternative,
5 Your Honor, with regard to that formula. Either it's a
6 mutual mistake of fact, which, based upon the record, maybe
7 it's more of that than it was of negligent
8 misrepresentation.

9 THE COURT: Could you explain that formula. I
10 mean, I don't understand it. Can you just give me kind of
11 a quick layman's overview as to what the formula was, when
12 it was supplied, and what was missing from it in order to
13 make it accurate.

14 MR. MARKHAM: Yes. The Plaintiff's area of
15 expertise included mail solicitation campaigns; creating
16 those, analyzing those, and sending those out. They
17 represented to the Defendants that here, based upon our
18 experience, is what you can expect from a certain number of
19 mailings, 200,000 mailings. You get so many that are not
20 returned, you get so many returned. Of those -- or some
21 interest is shown. Of those, a smaller percentage actually
22 goes through with the deal, and another percentage results
23 in a funding of the source -- of the loan.

24 And the e-mail that was sent to us, and there
25 was a number of them, are made part of the record which

1 lays out the mathematical steps that were followed by the
2 Plaintiff to explain -- or to represent, hey, this mailing
3 campaign is going to be very, very profitable. In fact,
4 it's going to be able to fund the entire venture here.

5 What was missing was, a deduction whereby the
6 borrower who responds is really ineligible for whatever
7 reason. And a good number of people who respond are
8 ineligible for loan consolidation. So that deduction was
9 not included in the mathematical formula, thereby
10 overstating by a large percentage --

11 THE COURT: What your expected profit margin
12 would be.

13 MR. MARKHAM: Yes. What the expected revenue
14 would be.

15 THE COURT: Revenue would be. From which your
16 profit would be taken after overhead.

17 MR. MARKHAM: Yes. And in depositions in this
18 case, the Plaintiff's representatives who gave us this
19 formula said that -- in fact, that very day he came to
20 realize that that component was missing.

21 THE COURT: By how much?

22 MR. MARKHAM: I think it reduced the likely
23 revenue by -- or likely recipients by something like 70
24 percent. It was a huge reduction. So that's the formula,
25 that's what was missing, and that was the basis of our

1 claim of mutual mistake of fact. We went into this, all of
2 us, giving him the benefit of the doubt thinking --

3 THE COURT: Mutual mistake of fact -- going back
4 to basic Hornbook contract law. If there's a mutual
5 mistake of fact, among other things, it has to represent a
6 material aspect of the contract, a sine qua non of the
7 contract, which was critical to parties entering into it.

8 But the remedy, it seems to me, for a mutual --
9 if, in fact, there was one or wasn't one, the remedy for
10 mutual mistake of fact that you're looking for is, I
11 gather -- the remedy can be two-fold: One can be a
12 reformation of the contract to try to put the parties in
13 the -- to try to put the parties in the position they would
14 have been if the mistake had not been made -- that's not a
15 viable remedy here, correct?

16 MR. MARKHAM: I don't think so.

17 THE COURT: But in your pleading, you're looking
18 for rescission of the contract based upon a mutual mistake
19 of fact; is that correct?

20 MR. MARKHAM: Yes.

21 THE COURT: But it still leaves one with this
22 question: If the contract has already been terminated, it
23 was terminated by the Plaintiff, and as we discussed
24 earlier, it is undeniable that a -- albeit perhaps a
25 smaller one than you anticipated, but a monetary benefit

1 was conferred on your client by virtue of its performance
2 under that contract. Whether it be under a quantum meruit
3 theory or an implied contract theory, why isn't the
4 Plaintiff entitled to its percentage under that contract?

5 MR. MARKHAM: I guess our view, Judge, is that
6 if the contract is rescinded only on the basis of some
7 other theory, quantum meruit, for instance, could the jury
8 find that they're entitled to that amount. The jury may
9 find, correctly, that they're entitled to much less. The
10 Plaintiff may argue that they're entitled to much more.
11 But the contract percentage was based upon a mutual mistake
12 of fact of what revenues would be generated.

13 So we're not saying that necessarily they get
14 nothing more than they received. We're saying that -- we
15 would argue that they shouldn't, but we're saying it's now
16 up to the jury, under some other theory, perhaps, what
17 value --

18 THE COURT: What would be the benchmark for
19 that? The problem in this case -- this isn't a case where
20 a workman supplies material and labor to someone and then
21 isn't paid. And you can -- you know, there's a certain
22 concrete aspect to that. And you bring in other laborers
23 in the area and they say, well, this is what I charge.
24 This isn't that. Against what backdrop, absent a contract
25 which indicates what the percentages are -- against what

1 backdrop would a jury determine what was a fair and
2 equitable distribution as to the profits between you and
3 the Plaintiff? What would be the -- what would I tell them
4 in a jury charge on that? How would that work out in the
5 real world?

6 MR. MARKHAM: Well, although I haven't thought
7 this through, I would suggest that the jury can look at
8 what was promised in terms of revenue, and, therefore,
9 profit to both sides, and what actually happened. How --
10 what was delivered. What was delivered, what was promised,
11 and, if so, are they then entitled to the 28 percent. If
12 it wasn't what was promised, delivery was deficient, maybe
13 they're entitled to something less given the reduction in
14 income and revenues that the Defendants received.

15 THE COURT: Tell me if this is true: I mean, in
16 terms of 27 -- what is it? 28 percent versus -- what are
17 the relative percentages? 28.5?

18 MR. MARKHAM: It's --

19 MR. FARRAR: It's 28.57 percent.

20 THE COURT: Versus the balance -- see, he
21 remembers. He knows what his client is supposed to get.

22 Here is, fundamentally, the problem I'm having
23 with this: Whether you're on the equity side, kind of in
24 the quantum meruit side, or just on the straight contract
25 side, what difference does it make, in terms of what the

1 relative percentages should be, based upon the size of the
2 pot at any given point in time? I mean, if they made any
3 money for you, why wouldn't you owe the percentage that was
4 in the contract? I mean, they make less because there's
5 less gross profit; you make less because there's less --
6 there's less revenue generated; and then, maybe, on another
7 month the boat goes up a little bit. So you both make out
8 better. On another month it comes down. But the
9 percentages never change, what is wrong with that? I just
10 can't get it through my head.

11 MR. MARKHAM: Maybe it's my lack of explaining
12 it more clearly. The Defendants spent a lot of money
13 getting this project up and running and operating. And
14 that --

15 THE COURT: What were some of the particulars of
16 that ramping up?

17 MR. MARKHAM: It was basically employee time,
18 salaries and training, and working on computer programs to
19 follow and track payments and applications and each step of
20 this multi-step process to get loan consolidation. So it
21 wasn't as if they have no expenses so everything that comes
22 in is just gravy. They have huge expenses. I mean, they
23 testified that it wasn't until close to the end of the
24 first year that they were seeing some daylight of revenues
25 over expenses. Now, there's a lot of disputes about that,

1 but that's their view of what was happening at this point.

2 So it wasn't as if we have the same expenses as
3 the Plaintiff, or we have no expenses and it's just money
4 rolling in. That's not the situation. We incurred
5 expenses in development and planning and operations at a
6 certain level based upon what we were informed this would
7 bring in. And that promise, representation, justified the
8 investment in time and money that we made.

9 THE COURT: Let me ask you this, a little off
10 the question of ramping up, but of what significance is it
11 that you people continue to perform under the contract for
12 a considerable period of time when allegedly you were aware
13 that the contract in some particulars that you considered
14 material such as quality and quantity, were not being
15 adhered to? Is that a waiver?

16 MR. MARKHAM: No. I don't think so. The
17 testimony was that the Defendants were committed to the
18 program, they made all these investments, they wanted to
19 work. They were hoping against hope that it would turn
20 out, that they'd turn the corner and this project would be
21 as profitable as they had been promised it would be.
22 So it never waived any rights. They, in fact, were hoping
23 that what they were seeing was an exception to the rule and
24 that things would turn around for them.

25 THE COURT: The Magistrate Judge, on this mutual

1 mistake of fact, if I remember the R&R correctly, cites
2 Pennsylvania law for the accurate proposition that mutual
3 mistake of fact cannot be based on -- cannot be predictive
4 in terms of events that may or may not occur in the future.

5 What's your -- and in this case, the amount of
6 profit that might be generated in the future, as would be
7 true of any enterprise, whether it would be lists or car
8 sales or anything else, is an element of some speculation
9 and uncertainty; isn't it?

10 MR. MARKHAM: Yes. As a -- by its nature, a
11 prediction is that. Our point is that we're not talking
12 about a prediction. We're talking about the accuracy of
13 this formula, whether it contained all the components it
14 should have contained. That's the existing fact, as of the
15 time the contract was formed, that we relied upon. Here's
16 the formula, and we know -- according to the Plaintiffs,
17 they were saying, we know this is an accurate way to
18 calculate. Turned out to be not an accurate way to
19 calculate.

20 THE COURT: Where does your \$16 million damage
21 claim come from?

22 MR. MARKHAM: That comes from what would have
23 received if the project performed as promised by the
24 Plaintiff, compared to what actually happened. If the
25 Plaintiff made the mailings that they had promised, if the

1 Plaintiff's list quality was in the nature of what they
2 represented before the contract was signed, that would have
3 been the income based upon those factors.

4 THE COURT: Would it also have been the income
5 based upon the incorrect profit margin formula or the
6 correct profit margin formula?

7 MR. MARKHAM: It's the incorrect profit margin.

8 THE COURT: Well, what possible sense does that
9 make? How can you be the beneficiary of a formula that is
10 patently incorrect?

11 MR. MARKHAM: Well, this is what they sold us.
12 So if they adhered to their promises, this is what we would
13 have received. It's as if they sell us a car and say
14 there's radio in it, and there's no radio in it. We didn't
15 get the radio, but we're entitled to the value of the
16 vehicle with the radio, as they promised.

17 THE COURT: When things went south and the
18 contract was terminated, for lack of a better term -- this
19 is not really germane to our discussion on the objections,
20 but it's just filling in some gaps for me -- did you folks
21 go out and cover?

22 MR. MARKHAM: Yes.

23 THE COURT: What did you do?

24 MR. MARKHAM: We started buying lists on our
25 own. And we -- the contract was terminated without any

1 advance notice. We didn't have someone to step into the
2 place of Delaware Marketing to get the lists for us, so we
3 started doing the work ourselves.

4 And after we went through a learning curve, we
5 were getting results better than we had with Delaware
6 Marketing.

7 THE COURT: In retrospect, you say to yourself,
8 we should have done it ourselves?

9 MR. MARKHAM: Hindsight is pretty good, I guess.

10 THE COURT: I understand full well that you do
11 not agree with the Magistrate Judge's dismissal of your
12 contract claim, in part, on the basis -- where she
13 dismissed it, in part, on the basis of parol evidence rule.
14 I understand that. But I'm going to ask you this question
15 anyway, and I'm not asking you to fall on your own sword,
16 but I'm just going to ask your impression. Is there an
17 inconsistency between the Magistrate Judge's dismissal of
18 your counterclaim in part on the basis of the operative
19 effect of the parol evidence rule and the Magistrate
20 Judge's failure to have granted summary judgment to the
21 Plaintiff on its contract claim on the basis that there
22 were -- that there was parol evidence that precluded it?
23 Do you understand my question?

24 MR. MARKHAM: I think you lost me.

25 THE COURT: Do you understand my question, Mr.

1 Farrar?

2 MR. FARRAR: I do, Your Honor.

3 THE COURT: You're not up yet. Let me come at
4 it this way: On the question of parol evidence, just as a
5 matter of symmetry, if the parol evidence rule does not
6 bar -- let me put it this way: If the parol evidence rule
7 would operate in such a fashion as to defeat your contract
8 claim in part, insofar as quality and quantity are
9 concerned, then it would have to be, as a matter of logic,
10 that the parol evidence rule could not be -- that the
11 issues of quality and quantity could not be used to defeat
12 the Plaintiff's contract claim; isn't that right?

13 MR. MARKHAM: Now I understand what you're
14 saying, Judge.

15 THE COURT: There's a disconnect between those.
16 Either one's right or one's -- they have to be the same,
17 don't they, to be intellectually consistent?

18 MR. MARKHAM: I don't know if they need to be
19 the same.

20 THE COURT: Can you distinguish -- I know you
21 disagree with the reasoning in the one, but can you -- is
22 there any basis upon which to distinguish the other? The
23 way it was resolved.

24 MR. MARKHAM: Well, I think, in terms of the
25 Plaintiff's motion to be granted summary judgment --

1 THE COURT: Plaintiff's motion would be this:
2 The percentages are set forth in the agreement; parol
3 evidence is not admissible on that, in terms of quality and
4 quantity; and the Plaintiff gets a judgment of liability
5 with the only issue left of damages.

6 MR. MARKHAM: That's the Plaintiff's position.

7 THE COURT: That's the Plaintiff's position.

8 MR. MARKHAM: Our position is, it doesn't make
9 sense to us that there be no requirement imposed upon the
10 Plaintiff, either expressly, through parol evidence, or
11 impliedly, as we've argued, that there be some level of
12 performance required, and there has to be some value for
13 what it has done to earn its payment. The fact that income
14 came in is not the sole or determinative factor of whether
15 the Plaintiff is entitled to be paid for what it did.

16 THE COURT: Doesn't the the evidence show -- and
17 this might be oversimplifying it by a quarter or a half,
18 but there's certainly some truth to it -- that Mr. Covato,
19 during the term of this agreement, he decided, based upon
20 his own gut instinct, at any given point in time how much
21 money should be forwarded to the Plaintiff and how much he
22 was going to retain for overhead expenses among his various
23 companies?

24 MR. MARKHAM: I think, in part, you're correct,
25 Judge. And to give a full explanation of that, his

1 priority was to make sure the expenses are covered, because
2 if we can't pay the people making the calls, nothing is
3 going to come in. So his focus was, first, pay that. And
4 for many, many, many months there was not enough to pay
5 anybody anything more, despite the promises going into this
6 project. So you're correct that he decided that instead of
7 paying Delaware Marketing, we have to pay the workers to
8 continue making the calls; and that's what he did. And
9 that's what the testimony would be.

10 THE COURT: Is there anything else you want to
11 tell me? I'm going to give you a chance to come back up
12 after we hear from --

13 MR. MARKHAM: That may be a more efficient way
14 to --

15 THE COURT: Why don't we do that. It'll sharpen
16 the discussion. All right. Thank you.

17 Yes, sir. Shall we begin with mutual mistake of
18 fact? I notice you didn't address that in your papers, at
19 least insofar as he has tied up this issue, and that is the
20 formula mistake. Is that a mutual mistake of fact?

21 MR. FARRAR: Brett Farrar, Your Honor. If I
22 could just -- I will address that point, but I wanted to
23 clarify one thing that he said with respect to the revenues
24 generated. He indicated \$9 million, Mr. Markham did,
25 during the discussion. I brought a document with us today

1 that has been identified in the pretrial statement, and
2 this shows that the amounts of money that were wired to the
3 Defendants by a company by the name of Brazos, and the
4 revenues, when you tally all this up --

5 THE COURT: Tell me again, I read it, but what's
6 Brazos?

7 MR. FARRAR: That's an independent third party
8 entity that was utilized for -- in this loan consolidation
9 program to provide funds back.

10 THE COURT: All right.

11 MR. FARRAR: The total amount of money on that
12 document is \$16,308,094.30. I just wanted to correct that
13 statement. It's over \$16 million.

14 THE COURT: How much have you been paid?

15 MR. FARRAR: Nothing.

16 THE COURT: They say you've been paid --
17 800-and-some thousand --

18 MR. FARRAR: \$750,000, or thereabout. This
19 involves the amount of money that was based upon the
20 percentages beyond that. Of the money that hasn't been
21 paid, is my understanding, Your Honor.

22 THE COURT: Let me see if I have this right.
23 You say that revenues of \$16 million were generated; is
24 that right?

25 MR. FARRAR: That is correct

1 THE COURT: And he used the figure 9 million;
2 you believe it's 16 million. But of that 16 million, what
3 percentage of that 16 million, if, in fact, it was 16
4 million, does your discovery or research reveal you were
5 paid?

6 MR. FARRAR: Yes. Beyond that \$750,000 amount,
7 the discovery has revealed that they weren't paid any
8 percentage of the amount beyond that.

9 THE COURT: So you're telling me that you were
10 paid 750,000 on gross revenues of 16 million? Is that what
11 you're telling me?

12 MR. FARRAR: Your Honor, if I could refer to the
13 Complaint.

14 THE COURT: Yes.

15 MR. FARRAR: There's a paragraph in the
16 Complaint -- Paragraph 14 of the Complaint, Your Honor,
17 states that --

18 THE COURT: This is your Complaint?

19 MR. FARRAR: That's correct. Of the
20 Plaintiff's, Delaware Marketing Partners', initial
21 Complaint that started this action. Paragraph 14, "As of
22 the date of filing this complaint, Defendants have paid
23 Plaintiffs \$755,007.45. Leaving a balance due of
24 \$834,490.49, plus 28.57 percent of all gross revenues
25 received by Defendants after October 31 , 2003." So that

1 amount of money, if I'm correct on this, actually involved
2 some costs that were to be divided among the parties
3 initially. And then --

4 THE COURT: Well, you terminated the contract as
5 of what?

6 MR. FARRAR: January of '04.

7 THE COURT: '04. So you're not entitled to any
8 things beyond that?

9 MR. FARRAR: Well, the thing is is that some of
10 this revenue that came in --

11 THE COURT: Trickled in after --

12 MR. FARRAR: -- stems from work -- exactly.
13 Stems from work that occurred before that.

14 THE COURT: Let me try one more time this way:
15 You contend that you were entitled to 28.57 percent of the
16 revenue that was generated, right?

17 MR. FARRAR: Yes.

18 THE COURT: Under the contract, right?

19 MR. FARRAR: Yes.

20 THE COURT: My question to you is, it's your
21 position you were not paid 28.57 percent, correct?

22 MR. FARRAR: That is correct.

23 THE COURT: Have you taken the time to figure
24 out, as a matter of arithmetic, what percentage of the
25 revenue that you generated for these people you, in fact,

1 were paid?

2 MR. FARRAR: No, Your Honor. But what we did do
3 is, we took the amount of money that was obtained -- or
4 discovered through discovery, and multiplied that by the
5 percentage. And that's how you come up with the money --
6 the amount, I should say.

7 THE COURT: Mr. Markham said roughly 10 percent.

8 MR. FARRAR: I don't know if that's correct
9 given the fact that he based his number on a \$9 million
10 figure.

11 THE COURT: Go ahead.

12 MR. FARRAR: I don't know if you would like --

13 THE COURT: No. For present purposes I don't
14 need it.

15 MR. FARRAR: Okay. Back to the mutual mistake
16 of fact, Your Honor.

17 THE COURT: Let's talk about that.

18 MR. FARRAR: And your question, I'm sorry?

19 THE COURT: Well, my question is this -- but
20 first of all, at the inception -- was that information, the
21 formula, provided at the inception of the contract, or did
22 it find its way into the contract? Was it part of the
23 contract?

24 MR. FARRAR: No. The formula is not part of the
25 contract.

1 THE COURT: Explain this formula to me. How it
2 arose on the scene, preliminary to the execution of the
3 contract; who came up with it; and why, if it is, it's
4 wrong.

5 MR. FARRAR: Yes, Your Honor. There was an
6 e-mail, and I believe that -- and Mr. Markham can correct
7 me if I'm wrong, but there was an e-mail in January of 2003
8 from Allen Estes, who was an individual with Delaware
9 Marketing Partners, to Terry Smith, who is an individual at
10 Teletron, one of the Defendants, that discusses an
11 estimated performance of a mail campaign. And that's
12 where, I do believe -- and correct me if I'm wrong, Mr.
13 Markham -- I do believe that is where they are claiming
14 that this formula comes from.

15 THE COURT: All right. Now, is it true, per Mr.
16 Markham's contention, that there was a defect in the
17 formula? There was something that was missing from the
18 formula?

19 MR. FARRAR: My understanding, that is correct.

20 THE COURT: What is it?

21 MR. FARRAR: There was a percentage that was
22 missing from the formula itself.

23 THE COURT: Would the upshot or would the effect
24 of that missing piece of the puzzle be to reduce the amount
25 of revenue that one could expect to generate with a certain

1 number of lists?

2 MR. FARRAR: The upshot is is that it would
3 reduce the amount, yes, Your Honor.

4 THE COURT: All right. Then run now to the
5 merits -- address the merits of Mr. Markham's argument that
6 the Magistrate Judge was incorrect in granting summary
7 judgment on Count 2 of the counterclaim, which is the
8 mutual mistake.

9 MR. FARRAR: It is our position that the
10 Magistrate Judge was correct. And, No. 1, this -- from a
11 mutual mistake perspective, mistake of fact perspective,
12 that amount -- or formula, let's say -- that formula was an
13 estimation purely. A purely estimated guess, if you will.
14 Speculation of performance under a contract. And the case
15 law is clear that that type of an estimate cannot form the
16 basis for a mutual mistake of fact argument. And the
17 Magistrate Judge correctly recognized that, and based upon
18 well-established case law.

19 Also, what we have here is we have two
20 sophisticated business entities discussing amongst
21 themselves an estimation for future performance. I think
22 that the Defendants know what a projection is or an
23 estimation of future performance is as opposed to fact. I
24 mean, they're in the business of this.

25 As well, also, this -- the upshot of this is

1 that there is no indication that the mathematical formula
2 was the end-all, be-all of the discussion. What the
3 discussion was about was revenue being generated, and a
4 projected estimate of revenue. And as a result, the
5 Magistrate Judge was correct in saying that if this case is
6 about a mathematical formula, as Defendants are arguing,
7 that is much too narrow a position --

8 THE COURT: He says the fact on the grounds that
9 it was wrong was the mathematical formula.

10 MR. FARRAR: Your Honor, that is clearly shown
11 to be in the documentation, and it is not disputed that it
12 is an estimate. And that alone does not form the basis of
13 a mutual mistake.

14 THE COURT: Now, assuming that it did, for
15 purposes of my question, and the contract -- do you agree
16 with me that the remedy for mutual mistake is either
17 reformation or rescission?

18 MR. FARRAR: My understanding, it is.

19 THE COURT: What, if anything, does that do to
20 your damage claim if the contract were rescinded?

21 MR. FARRAR: Well, the damages -- we would still
22 have the same damages.

23 THE COURT: How so?

24 MR. FARRAR: Because, assume for a moment
25 that -- and we disagree with that --

1 THE COURT: And I mean it in this sense -- and I
2 understand that your position is that, for all the reasons
3 you said and the reasons the Magistrate Judge indicated in
4 her R&R that there is no mutual mistake. But here's
5 conceptually what I'm having trouble with, if the contract
6 is rescinded, and I know you terminated it, but a
7 declaration of rescission by me would essentially be the
8 same as saying, there never was a mutual meeting of the
9 minds on a material point necessary. If that was the case,
10 then there would have been no contract and the 28.5 percent
11 and the other percentage would really no longer exist. So
12 where would you get your -- upon what basis would you then
13 seek your damages?

14 MR. FARRAR: Well, we would have to seek the
15 damages upon some type of an equitable theory, such as
16 unjust enrichment or something along those lines.

17 But at the end of the day, the revenues
18 generated would be the same. And the documentation, the
19 contract that does exist -- did exist, would certainly be
20 evidence of intent of the parties, with respect to a claim
21 for unjust enrichment, to show the intent of the parties
22 throughout the performance of this relationship. And that
23 would establish the percentages, Your Honor, obviously.

24 THE COURT: What would establish the
25 percentages?

1 MR. FARRAR: The documentation. Whether you
2 call it, at that point, a contract or not. For example,
3 even if it were just a letter between the parties, that --

4 THE COURT: In other words, it would be some
5 evidence as to what the party's belief was as to what was
6 an appropriate distribution?

7 MR. FARRAR: Yes, Your Honor. And, also, it's
8 been clearly testified in the deposition testimony of Mr.
9 Covato -- and I know I'm going to say who drafted the
10 contract, and that sort of gets out of your question a
11 little bit. But Mr. Covato, the person who formulated this
12 relationship, admitted that that was supposed to be the
13 percentage of revenues paid to Delaware Marketing Partners.
14 That would also be evidence.

15 So I don't see how that percentage is not going
16 to be applied to the gross revenue even if you assume, and,
17 again, I agree with the Magistrate Judge's Report and
18 Recommendation, that's correct. But to answer your
19 specific question, even if you assume the contract is
20 rescinded.

21 THE COURT: What else do you want to tell me?
22 Let's move on to your -- I take it your objection -- I take
23 it you have one objection to the Magistrate Judge's R&R,
24 and that is her failure to have granted you summary
25 judgment as to liability on your contract claim; is that

1 right?

2 MR. FARRAR: That's right. With respect to
3 everything else of the Magistrate's ruling, we agree. And
4 with respect to what I will call Delaware Marketing
5 Partners' affirmative summary judgment motion to its
6 Complaint, we believe that, as Your Honor has discussed
7 this morning, with the examples of the boat on the water,
8 et cetera, that the contract itself does not require a
9 qualitative assessment of the performance of either
10 parties' work. And to do so in the Magistrate's
11 Recommendation and Report is in error on that fact. And
12 simply put, what we're saying is that any revenue generated
13 and collected by the Defendants from work and services
14 performed under the contract, Delaware Marketing Partners
15 is entitled to 28.57 percent of that amount. Whether the
16 revenues generated are greater than anticipated or lower
17 than anticipated.

18 THE COURT: What about this relation back
19 argument. You know, there's a ton of case law out there
20 that stands for the proposition that where you have a
21 compulsory counterclaim -- and I'm beyond this issue about
22 it not being raised with the Magistrate Judge. I can look
23 at it de novo if I want to. But isn't there a fair amount
24 of case law out there that, basically, in a relationship
25 back situation with compulsory counterclaim, relates you

1 back to the original answer that was filed? And I guess I
2 simply ask rhetorically, but substantively, if that is the
3 case, then those claims that were dismissed as untimely
4 would be timely by virtue of the date of the answer; is
5 that right? Counterclaim was not filed until 2006.

6 MR. FARRAR: September 22, 2006.

7 THE COURT: The answer would have been filed --
8 the precise date is escaping me, but it would have been in
9 under the two-year statute of limitations applicable to
10 those misrepresentation claims; would it not?

11 MR. FARRAR: Aside from the waiver that we
12 raised in our --

13 THE COURT: I've never been a big waiver fan on
14 either side of the fence.

15 MR. FARRAR: If you look at the main case that
16 they rely upon, it's actually distinguishable from the
17 other case that we cited. In the case that we cited -- and
18 I'm looking for that right now.

19 THE COURT: Was it Davis?

20 MR. FARRAR: That's correct, Your Honor.
21 There's a discussion about this Perfect Plastics case, and
22 the discussion in Davis indicates that they weren't
23 attempting to file a first counterclaim, they were trying
24 to amend a counterclaim. And if that's the case -- we know
25 that this didn't occur in this case until September 22,

1 2006 -- it would be late.

2 Also, we cite the other case in there that
3 discusses the fact that under Rule 13F, the statute of
4 limitations would -- involving the state law would bar
5 recovery in this matter.

6 THE COURT: Why was it, with respect to your
7 performance under the contract, that, if memory serves,
8 there was only two months where you supplied those monthly
9 lists?

10 MR. FARRAR: Yes, Your Honor.

11 THE COURT: Is there a dispute as to whether the
12 quality of your lists fluctuated over a period of time?

13 MR. FARRAR: I don't know if there's a dispute
14 as to whether the quality did change over time. I -- I
15 think what we're saying is it doesn't matter. Based upon
16 the contract that they wrote, the parol evidence rule, and
17 the integration clause in the contract itself.

18 THE COURT: Is there anything else you want to
19 tell me?

20 MR. FARRAR: Would I have a chance to respond if
21 he says anything?

22 THE COURT: Well, we could be here forever.

23 MR. FARRAR: I understand. I don't think so,
24 Your Honor, at this time. What was stated in the papers
25 and the Magistrate's Report and Recommendation, I think,

1 sums it up.

2 THE COURT: All right.

3 MR. FARRAR: Thank you.

4 THE COURT: Mr. Markham -- actually, why don't
5 you sit down for a second, and I'm going to give my court
6 reporter a short little break, and we'll come out and
7 we'll -- before I get off, though, one thing is -- getting
8 off the liability horse here and just talking about
9 damages, there are disputed issues of material fact as to
10 how much money you have or have not been paid as between
11 the parties; is that right?

12 MR. FARRAR: With respect to purely damages,
13 Your Honor?

14 THE COURT: Yes.

15 MR. FARRAR: It sounds as if there is.

16 THE COURT: You dispute their claims in that
17 regard; don't you?

18 MR. MARKHAM: Yes. I'm not sure what time frame
19 he's looking at to come up with 16 million as an example of
20 a dispute. I got 9 million as of January 9, 2004.

21 THE COURT: All right. That sounds like a
22 material dispute to me. We'll take a short recess.

23 (Recess taken from 10:47 a.m. to 10:57 a.m.)

24 THE COURT: Before you come up here, Craig, let
25 me ask you one other question here. This formula that was

1 sent in the e-mail, that said estimate --

2 MR. FARRAR: Correct.

3 THE COURT: -- when does the record reflect, if
4 it does reflect, that the Defendant became aware that there
5 was an error in the formula?

6 MR. FARRAR: The Defendants are stating that
7 they became aware of it during the deposition that occurred
8 in this case. Aside from that, I don't see anything else
9 in the record that indicates that they are or are not aware
10 of it. They are saying that they became aware of it during
11 a deposition that occurred in May of 2006.

12 THE COURT: Anyway, getting back to this mutual
13 mistake of fact, it's your position that the formula was
14 sent, and it was sent as an estimate; is that what your
15 point is?

16 MR. FARRAR: That's correct. In fact, on the
17 e-mail itself it's identified as such. It's identified as
18 an estimated performance. I mean, it is what it is. It
19 says it's an estimated mail campaign performance.

20 THE COURT: All right. Let me hear from Mr.
21 Markham.

22 MR. MARKHAM: Just on that point, Judge , the
23 e-mail, which is attached to our counterclaim as Exhibit B,
24 dated January 7, 2003, it wasn't told to us that the
25 formula is an estimate of what the formula should be. It

1 was, here is the formula. If you apply it to certain
2 assumed facts, this is what the outcome should be. So,
3 again, our point is the formula is what the mistake was.
4 Not what the future held, but the formula was an inaccurate
5 statement.

6 On the issue of relation back, just to briefly
7 state it, the one case we cited, Perfect Plastics, stands
8 for the proposition that if you want -- if the Defendant
9 wants to add a counterclaim, and that's granted, then it
10 relates back under Rule 15(c), it relates back to the
11 original answer. And in that case, clearly as reported in
12 the Court's decision, the Defendant was adding something.
13 It was adding a counterclaim; it wasn't modifying an
14 existing counterclaim.

15 And the Davis case, which came after, doesn't
16 say that. It doesn't say that in Perfect Plastics they
17 already had a counterclaim, and they were just amending it.
18 In fact, I think the footnote, they've been talking about
19 about Footnote 16 in the Davis case, accurately states that
20 in Perfect Plastics they were adding a new counterclaim.
21 So I don't think those two cases distinguish ours to the
22 general rule that an amendment would relate back.

23 The only thing we haven't talked about deals
24 with the Magistrate Judge's recommendation for summary
25 judgment on our counterclaim, to the extent it survived her

1 recommendations in the Motion to Dismiss, and that would
2 leave us with the claim of the violation of noncompete. The
3 Magistrate Judge concluded there was insufficient evidence
4 to support a claim that the noncompete was violated.
5 However, in her own opinion, the Magistrate Judge cites
6 from the record and quotes from the record that supports
7 the conclusion that the noncompete was, in fact, violated.
8 And there was evidence of record, through deposition
9 testimony, attached to our Motion to Dismiss, which
10 confirmed what the Magistrate Judge was citing to. That
11 being that the principals of the Plaintiff, in the winter
12 of '03, were creating a new company and getting everything
13 in place to start competing with us. And by that I mean
14 actually negotiating contract, paying customers, setting up
15 its operations, so that when they terminated our contract,
16 they could open the doors immediately and begin competing,
17 which is what they did. So our point is that there's
18 certainly evidence of record, and, in fact, the Magistrate
19 cited to it, which would support our counterclaim on the
20 breach of noncompete.

21 THE COURT: All right. Does someone have that
22 e-mail handy? Let me see it. So it says, "Estimated
23 commission"; is that what you're talking about?

24 MR. FARRAR: Your Honor, in the "RE:" line --

25 THE COURT: In the what?

1 MR. FARRAR: In the "RE:" line to the e-mail,
2 the subject line --

3 THE COURT: Yes.

4 MR. FARRAR: It's an estimated mail campaign
5 performance. So that e-mail is dealing with an estimated
6 performance.

7 THE COURT: Where is the formula on here? Is
8 there some kind of formula on here?

9 MR. MARKHAM: It's in the box. There's
10 percentages, the formula components are there in the middle
11 box, and the outcome applying formula to the 200,000 piece
12 universe is in the right-hand box. So, for instance -- if
13 I may, Your Honor, explain this a little more, if you would
14 like. The response, at 1.33 percent, that's someone
15 actually responding in some way to the mailing. The next
16 line is the -- actually -- when they respond, they're then
17 sent a promissory note to sign. Of those responding, of
18 those 1.33 percent, 45 percent will actually sign the
19 promissory note and return it.

20 Then the fund line, that means once the
21 promissory note comes back as signed, we send it on to the
22 lender. The lender then reviews all the documentation and
23 decides whether or not to fund the loan. So of those who
24 respond and, then, of those who sign the note, the lender
25 would fund or accept as a borrower 70 percent.

1 Then we have the average loan amount and then
2 the estimated commission on the average loan amount apply
3 to those other factors which are derived from the formula.

4 THE COURT: But where is the formula?

5 MR. MARKHAM: I'm sorry, Judge. The formula is,
6 you take 200,000 mailings, you multiply that by 1.33
7 percent first. That tells you how many will respond.
8 That's 2,660 will respond. Then you multiply that by 45
9 percent, and then you multiply that by 70 percent. So at
10 the end of applying those mathematical factors, you'll have
11 838 people out of 200,000 who will actually result in a
12 loan being funded.

13 THE COURT: How did they eventually tinker with
14 that?

15 MR. MARKHAM: What happened was, they left out a
16 reduction number, a percentage of like 70 percent, who,
17 although they signed the promissory note, are not eligible.
18 So you take that off before you get to the funding
19 percentage of 70 percent.

20 THE COURT: All that does is it -- I guess it --
21 it will reduce, by a certain percentage, the number of
22 people that will be eligible to participate, right?

23 MR. FARRAR: That's right, Your Honor. And,
24 again, it goes back to your understanding of the case.

25 Before I jump to that point, clearly this

1 document says it's an estimated performance. I mean,
2 that's not even in dispute. This is an estimate of future
3 performance of revenue.

4 But your point is correct. All it's going to
5 do is either lower or raise, however this is going to work
6 out, the end result, which is what we talked about this
7 morning already.

8 THE COURT: All right.

9 MR. FARRAR: There's one other thing, Your
10 Honor. Mr. Markham raised, in his final argument there, a
11 discussion with respect to the summary judgment as to the
12 breaches of contract with respect to the covenant not to
13 compete and the proprietary information.

14 THE COURT: Yes.

15 MR. FARRAR: Would you like me to respond --

16 THE COURT: Is the contract silent on -- let me
17 put it this way: Does the contract contain any provisions
18 relative to noncompete?

19 MR. FARRAR: Your Honor, the contract doesn't
20 say that these individuals could create another company.
21 It doesn't say that. The contract -- first of all, there's
22 no evidence of record generated through discovery that
23 shows that they, in fact, took proprietary information and
24 distributed it to some third party. It's true that they
25 created another company, and it's true that this contract

1 was terminated in January of '04, the contract we've been
2 discussing this morning. But beyond that, those two facts,
3 there isn't anything else of record -- and this has been
4 described fully in the briefing, and the Magistrate Judge
5 understood this and did an analysis in the Report and
6 Recommendation. Beyond those facts there is nothing else,
7 and that does not form the basis for such a claim.

8 THE COURT: All right. I'm going to take a few
9 minutes and look at this thing, and either I'm going to
10 come out and get an order on the record or not. I'm just
11 not exactly sure what I'm going to do yet. But stick
12 around here for a few minutes until I come back out.

13 (Recess taken from 11:07 a.m. to 11:12 p.m.)

14 THE COURT: This is going to be an order.

15 Presently pending before the Court are
16 objections filed with respect to the Report and
17 Recommendation of the Magistrate Judge. After careful
18 consideration of the written objections, as well as oral
19 argument, I adopt the Magistrate Judge's Report and
20 Recommendation with the following exceptions:

21 First, I find that the basis upon which summary
22 judgment was granted as to various claims set forth in
23 Count 3, fraud in the inducement, that is the basis of
24 summary judgment -- that is the basis of the statute of
25 limitations, was inappropriate. Specifically, as stated in

1 Banco, B-A-N-C-O, Para El Comercio Exterior,
2 E-X-T-E-R-I-O-R, versus First National City Bank, 744 F.2d,
3 237, Second Circuit 1984:

4 "The federal rules are to be construed so as to
5 secure the just determination of every action. Fed Rule
6 Civ Pro 1, the trial courts in this circuit have
7 accordingly ruled that a counterclaim amended pursuant to
8 Rule 13(f) may relate back to the date of the original
9 answer when the counterclaim arises out of the same
10 transaction it was pleaded in the answer and there is no
11 prejudice to the opposing party's ability to defend the
12 merits of the counterclaim citing cases. The court
13 continued, this practice 'is approved by the leading
14 commentators,' citing Moore's Federal Practice." That's at
15 Page 244.

16 See also Rodriguez -- that's wrong. See also
17 Rosenzweig, R-O-S-E-N-Z-W-E-I-G versus Suburban
18 Orthopaedics Associates, 1988 Westlaw 65905, -- wherein the
19 court cited numerous cases, holding that, "Where an omitted
20 counterclaim is compulsory under Federal Rule Civ Pro
21 13(a), it will relate back to the date of the answer in
22 accordance with Federal Civ Pro 15(c) when subsequently
23 added by amendment under Federal Civ Pro 13(f)." That's at
24 Page 7. And Perfect Plastics entries versus Cars and
25 Concepts, 758 F sup 1080, WDPa 1991.

1 That said, however, the misrepresentation claims
2 under Count 3 failed, in my view, for another reason. As
3 stated in 1726 Cherry Street Partnership, 439 (PA Super.)
4 141 (1995):

5 "The parol evidence rule has had a checkered
6 career in Pennsylvania. Now that it has been well and
7 wisely settled, we will not permit it to be evaded and
8 undermined by such tactics. Fraudulent misrepresentations
9 may be proved to modify or avoid a written contract if it
10 is averred and proved that they were omitted," highlight
11 omitted, "from the (complete) written contract by fraud,
12 accident, or mistake.

13 "In sum, Bardwell permits the admission of parol
14 evidence of representations concerning a subject dealt with
15 in an integrated written agreement and made prior to or
16 contemporaneous with the execution of the agreement to
17 modify or avoid the terms of this agreement only where it
18 is alleged that the parties agreed that those
19 representations would be included in the written agreement,
20 but were omitted by fraud, accident, or mistake. This is
21 commonly referred to as 'fraud in the execution' because
22 the party offering the evidence contends that he or she
23 executed the agreement because he or she was defrauded by
24 being led to believe that the document that he or she was
25 signing contained terms that were actually omitted

1 therefrom. Such a case is to be distinguished from a
2 'fraud in the inducement' case such as the instant one
3 where the party proffering evidence of additional prior
4 representations does not contend that the parties agree
5 that the additional representations will be in the written
6 agreement, but rather claims that the representations were
7 fraudulently made and that, but for them, he or she never
8 would have enter into the agreement." That's at Page 147.
9 See also Greylock, G-R-E-Y-L-O-C-K, Arms versus Kroiz,
10 K-R-O-I-Z, 879 A2nd 864 (Commonwealth of PA 2005), "Parol
11 evidence rule bars proof of fraudulent inducement to a
12 contract where the contract is fully integrated."

13 In this case, the Defendant, under Count 3,
14 asserts claims for fraud in the inducement in the contract,
15 not relative to the execution of the contract itself.
16 Furthermore, not only does the contract in this case
17 contain an integration clause, but it, in fact, was drafted
18 by the Defendant. Thus the misrepresentation claims, in my
19 view, are barred under the previously described controlling
20 Pennsylvania Appellate authority.

21 Let me also say a brief word at this point with
22 respect to the Magistrate Judge's discussion of mutual
23 mistake of fact. First, based upon my review of the R&R
24 and the discussion here today, I remain of the opinion that
25 the Magistrate Judge was correct in concluding that the

1 mutual mistake of fact claim fails, in part, based upon the
2 predictive nature of the future performance and for the
3 other reasons set forth in her R&R.

4 I also note, to the extent that it may not have
5 been included in the R&R, that the relevant e-mail in
6 question -- where is that? Did you take that back or do I
7 still have it?

8 MR. FARRAR: Your Honor, I believe you still
9 have it.

10 THE COURT: Uses the term "estimated" at the
11 top. In my opinion, it is an estimate of future
12 performance. The very formula upon which it is based -- or
13 was based, whether containing all the components or not,
14 was, by its very nature, speculative. And the case law is
15 clear that mutual mistakes of fact do not and cannot
16 appropriately apply to future speculative performance.

17 Finally, given the Magistrate Judge's conclusion
18 that the -- that the parol evidence bars the Plaintiff's
19 contract claim, a conclusion with which I agree, it must
20 follow, in my view, that parol evidence cannot be used to
21 defeat the Plaintiff's contract claim.

22 On that point, in addition to the Magistrate
23 Judge's discussion of parol evidence, insofar as it relates
24 to the counterclaim, let me say this: I disagree with the
25 Defendant's contention that the parol evidence rule should

1 not bar evidence of alleged discussions concerning quality
2 and quantity, because they would not contradict the terms
3 of the agreement. In my view, that is precisely the type
4 of information that classically should have been integrated
5 in the integrated agreement if it was to be operative.

6 As a matter of fact, it would, in fact,
7 potentially contradict the agreement because the clear
8 agreement, on its face, makes no provision for payment
9 depending upon either the quality or quantity of the lists
10 that were produced.

11 In short, then, I find that the Plaintiff is
12 entitled to Summary Judgment, as a matter of law, on its
13 contract claim.

14 The only remaining material -- to put a finer
15 point on it then, the only remaining material issue of fact
16 that I see between the parties is a dispute over the amount
17 of money that either was or was not paid pursuant to the
18 terms of the contract. And that will be -- in the event
19 that this case goes to trial, that will be the issue for
20 the jury.

21 We're going to set a pretrial conference in this
22 case, which is now limited solely to the issue of damages,
23 for August 30th, at 10:00 a.m. Jury selection and trial
24 will commence on September the 4th, at 9:00 a.m.

25 Let's go off the record here for a second.

(Hearing concluded at 11:26 a.m.)

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